

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

KARENZA CLINCY, et al.

Plaintiffs,

v.

**GALARDI SOUTH ENTERPRISES,
INC., d/b/a THE ONYX, et al.**

Defendants.

)
)
)
) **CIVIL ACTION FILE NO.**
) **NO. 1:09-CV-2082-RWS**
)

**DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL
FACTS AS TO WHICH NO GENUINE ISSUE REMAINS TO BE
TRIED**

COME NOW Galardi South Enterprises, Inc., "d/b/a The Onyx," Galardi South Enterprises Consulting, Inc., "d/b/a The Onyx," Pony Tail, Inc., d/b/a The Onyx, Michael Kapp (sic), and Jack Galardi, and pursuant to LR 56.1(a), submit this Statement of Undisputed Material Facts As To Which No Genuine Issue Remains to be Tried.

UNDISPUTED MATERIAL FACTS

1. Since July, 2006, Club Onyx has operated as a nightclub at 1888 Cheshire Bridge Road, Atlanta, Georgia. (Williams Dep. 12, 30-31).

2. Club Onyx caters primarily to the young and upscale among the "hip-hop, urban" and African-American communities. (Williams Dep. 59).

3. Unique among the many nightclubs in Atlanta, Club Onyx regularly features appearances by international superstar rap and R&B artists, including Plies and Swizz Beatz, and is frequented by celebrity sports and entertainment personalities. (Williams Dep. 67-70; Hayes Dep. 19-20, 31-32, 38-39; Adams Dep. 45-47, 49-52; Leaphart Dep. 72-73; Parker Dep. 151; Sales Dep. 88-89).

4. Club Onyx has adult entertainment in the form of nude, female exotic dancing. (Adams Dep. 57).

5. Club Onyx features full-service bars, numerous large-screen televisions broadcasting sporting events, pool tables, VIP rooms and a kitchen offering customers a variety of menu items. (Williams Dep. 101-103; Leaphart Dep. 98-99).

6. Club Onyx sells liquor to its customers not only by the glass, but also by the bottle. (Adams Dep. 47-48, 52).

7. Club Onyx does not recruit dancers. (Adams Dep. 19).

8. Dancers solicit Club Onyx to perform there because its upscale clientele and reputation for attracting celebrities makes it a lucrative venue at which to dance. (Clincy Dep. 73-74, 76-77; Leaphart Dep. 22-23, 46-47, 72-73, 96-97, 100-102, 143-145; Parker Dep. 46-47; Pough Dep. 42, 84, 90).

9. Dancers apply in person to perform at Club Onyx. (Clincy Dep. 31-32; Leaphart Dep. 46-49; Parker Dep. 47-49; Pough Dep. 42).

10. Most dancers who seek to perform at Club Onyx are skilled dancers who have prior experience performing exotic dancing at other clubs. (Williams Dep. 37; Clincy Dep. 20-21, 30; Parker Dep. 22, 27-30, 44-45; Sales Dep. 20, 99; Jordan Dep. 24-25, 46; Leaphart Dep. 17-19, 24, 40-47, 160; Pough Dep. 38).

11. Club Onyx does not provide any dance training to the dancers who perform there. (Clincy Dep. 31; Parker Dep. 53, 167).

12. Each dancer who seeks to perform at Club Onyx typically undergoes a body check by a Club "House Mom," and performs a short audition consisting of dancing to three songs. (Hayes Dep. 8-9; Adams Dep. 14; Swinger Dep. 54-58; Parker Dep. 48; Leaphart Dep. 47-49, 54).

13. Dancers are evaluated by Club management on their dancing skill and performance quality, experience, appearance, and communication skills. (Hayes Dep. 10; Adams Dep. 15-16, Williams Dep. 34, 36.)

14. Once Club management determines the dancer meets the quality standards expected of its customers, she is invited to perform there. (Adams Dep. 14).

15. Before any dancer can perform at Club Onyx, the City of Atlanta requires dancers to obtain from the City an individual adult entertainment license for each establishment at which she wishes to dance. (Hayes Dep. 15-16; Adams Dep. 31-32; Leaphart Dep. 50-52; Parker Dep. 48; Cliff Adams Decl., ¶7).

16. Plaintiffs are generally familiar with the City's licensing requirements, each having obtained similar licenses to dance at other venues at which they have performed. (Pough Dep. 24-25, 27-28, 38, 44-45; Parker Dep. 29, 50; Sales Dep. 20; Leaphart Dep. 50-52; Wells Dep. 16-17; Jordan Dep. 27, 41).

17. Dancers pay for their own adult entertainer license which cost \$350 per year. (Clincy Dep. 111; Leaphart Dep. 51-52; Pough Dep. 44-45; Parker Dep. 50; Sales Dep. 20; Cliff Adams Decl., ¶7).

18. Club Onyx does not reimburse the dancers for these expenses. (Clincy Dep. 111-112; Leaphart Dep. 51; Parker Dep. 162-163; Wells Dep. 79; Pough Dep. 45; Cliff Adams Decl., ¶7).

19. Once a dancer returns with a current license from the City allowing her to dance at Club Onyx, she is presented with a "Dancer Packet" of forms to review, complete, and return to Club management. (Hayes Dep. 15-16; Williams Dep. Ex. 9; Swinger Dep. 24-25; Clincy Dep. 36; Leaphart Dep. 64-66; Sales Dep. 38-39; Cliff Adams Decl., ¶¶9-10).

20. The "Dancer Packet" supplied by Club Onyx to each dancer includes the following documents: (1) Defendant's Club Rules and Conduct for Contractors and Employees; (2) Conduct in VIP Rooms; (3) Dancer Information Sheet; (4) Random Drug Test Consent Form; (5) Independent Contractor Agreement; (6) a document entitled "Wage Acknowledgment Regarding 'Tip Credit'" (a document explaining nature of independent contractor relationship between Club Onyx and Dancers and explaining how Dancers would be compensated if they were classified as employees); (7) Rules Recognition and Consent; (8) Request for Taxpayer ID Number (IRS Form W-9); (9) Employment Eligibility Verification (IRS Form I-9); and (10) Dancer Profile Identification Form. (Swinger Dep. 24-25; Cliff Adams Decl., ¶¶9-11).

21. Unlike for its wait and bar staff employees, Club Onyx does not perform reference checks on the dancers before they are invited to perform. (Adams Dep. 97).

22. Before they begin performing at Club Onyx, all dancers are asked to sign an Independent Contractor Agreement. (Sales Dep. 93; Swinger Dep. 57; Cliff Adams Decl., ¶¶9-10).

23. Before dancers ever perform, Club Onyx management explains to each that by signing the Independent Contractor Agreement, she acknowledges that she is an independent contractor and not a Club Onyx employee. (Swinger Dep. 57; Pough Dep. 112-113).

24. Consistent with industry standards, Club Onyx informs each dancer prior to and after signing the Independent Contractor Agreement that she works for herself performing directly for Club patrons, and that she will keep whatever table dance fees and tips she earns from the Club's patrons. (Parker Dep. 69-71; Wells Dep. 51; Jordan Dep. 50; Leaphart Dep. 93-96; Cliff Adams Decl., ¶¶9-10).

25. Most dancers, particularly those who have performed at other establishments offering adult dancing, prior to performing at Club Onyx are already very familiar with standard industry practices on how dancers earn money performing at clubs like Club Onyx. (Clincy Dep. 20-21, 25-27, 40; Wells Dep. 18, 28, 50; Sales Dep. 25, 28, 40; Jordan Dep. 27-28, 41-42; Leaphart Dep. 17-19, 26-29, 69, 91, 175-177; Parker Dep. 29-30; Pough Dep. 48-49).

26. Club Onyx does not pay any wages to the dancers who perform there. (Williams Dep. 75).

27. Dancers who perform at Club Onyx do not expect to receive a paycheck from the Club. (Clincy Dep. 25-27, 35; Pough Dep. 48-49; Jordan Dep. 27-28, 41-42, 50, 126; Leaphart Dep. 68-69; Parker Dep. 29-31, 70).

28. Unlike its wait and bar staff, who serve food and alcohol provided by the Club for its direct benefit and are on the Club's payroll, dancers provide their entertainment services directly to the Club's patrons for their own individual benefit, and are not on Club Onyx's payroll. (Williams Dep. 75).

29. Unlike its wait and bar staff, Club Onyx does not provide Workers' Compensation insurance for its contract dancers. (Williams Dep. 76-77).

30. The amount a customer pays a dancer for a table-side dance is ultimately decided by the individual dancer and the patron, though the industry-standard fee in the Atlanta market is \$10 per table-side dance. (Williams Dep. 60; Leaphart Dep. 91, 127; Wells Dep. 44; Sales Dep. 53; Jordan Dep. 89-90).

31. Customers are also encouraged to tip the dancers. (Parker Dep. 89-90).

32. The number of table-side dance fees and tips a dancer generates is driven by how many table-side dances she can convince patrons to purchase from her. (Wells Dep. 75; Jordan Dep. 100; Leaphart Dep. 97, 127; Pough Dep. 64).

33. The more assertive an individual dancer, the more table-side dances she is likely to be paid (by customers) to perform. (Clincy Dep. 73; Sales Dep. 71; Jordan Dep. 100; Pough Dep. 64; Parker Dep. 90).

34. Club Onyx does not count or track the number of table-side dancers the entertainers perform. (Williams Dep. 72; Hayes Dep. 57; Adams Dep. 67; Clincy Dep. 105; Leaphart Dep. 96).

35. The Club does not collect table-side dance fees or tips for dancers performing there. (Williams Dep. 60; Pough Dep. 70).

36. Not all of Club Onyx's customers ask dancers to perform table-side dances or tip them while performing on stage; instead, many customers come to Club Onyx simply to drink, dance, listen to music, watch sporting events, shoot pool, and have a good time in a hip, urban nightclub setting. (Hayes Dep. 69; Leaphart Dep. 97).

37. Plaintiffs pay Club Onyx to perform at one of Atlanta's hottest nightclubs, providing them the both the forum and the opportunity to earn large sums of money performing for the Club's customers. (Clincy Dep. 40-41; Leaphart Dep. 47; Pough Dep. 51, 84, 90; Parker Dep. 92).

38. Specifically, dancers pay Club Onyx a "bar fee" each night they perform on stage, the amount of which increases the later a dancer arrives at the club. (Williams Dep. 83; Hayes Dep. 42; Clincy Dep. 41; Wells Dep. 28-29; Leaphart Dep. 21, 61-63, 108, 148; Sales Dep. 40; Jordan Dep. 59).

39. Dancers choose for themselves when they wish to arrive at Club and how many hours to perform on a given night, and, in doing so, make their own decisions about how much they are willing to pay to the Club in bar fees. (Leaphart Dep. 63, 76-77, 179-180; Pough Dep. 47, 50).

40. On average, dancers work between three or four nights per week. (Swinger Dep. 84; Clincy Dep. 28-29, 53-54, 60, 84; Leaphart Dep. 29; Pough Dep. 43-44, 47).

41. When performing at Club Onyx, dancers generate their own revenue from Club Onyx's customers by performing table-side dances and by performing on stage. (Williams Dep. 80; Clincy Dep. 53-54; Leaphart Dep. 68, 94-96; Wells Dep. 51; Sales Dep. 53; Parker Dep. 87; Pough Dep. 48-49).

42. Entertainers also earn tips from the Club's customers by performing table-side dances and dances in the Club's VIP Rooms. (Jordan Dep. 50; Leaphart Dep. 93-96, 154).

43. Dancers at Club Onyx pay service providers for various services facilitated for them. For instance, a DJ, also an independent contractor, plays the music at the Club and, during and in-between sets, encourages the Club's customers to patronize and tip the dancers. (Williams Dep. 42; Clincy Dep. 57, 94; Wells Dep. 52; Leaphart Dep. 152).

44. Club Onyx asks dancers to tip the DJ each shift they work either twenty dollars (\$20.00) or ten percent (10%) of their gross receipts from that night, whichever is greater. (Clincy Dep. 56-57, 117; Leaphart Dep. 118; Wells Dep. 39; Parker Dep. 79).

45. Club Onyx also asks dancers to tip the "House Mom," a woman who assists them in the dressing room and on the floor with their various needs. (Williams Dep. 43; Swinger Dep. 113; Clincy Dep. 58, 117; Jordan Dep. 64-65; Leaphart Dep. 116-117, 132, 137-138, 152).

46. Dancers are free to bring into the Club with them their own hairstylists, make-up artists and fashion consultants. (Adams Dep. 13; Clincy Dep. 86-89, 115; Leaphart Dep. 81, Parker Dep. 107).

47. Dancers spend large sums of money selecting and purchasing their own costumes, shoes, cosmetics, hair and nails. (Clincy Dep. 86-90, 107-110; Clincy Dep. II, Ex. 1; Leaphart Dep. 84-88, 180; Parker Dep. 163; Cliff Adams Decl., ¶5).

48. In contrast to Club Onyx's bar and wait staff employees, the dancers set their own schedules, select which days and nights they want to work, and ultimately decide when they arrive and leave Club Onyx or if they will work at all. (Williams Dep. 47; Adams Dep. 36; Clincy Dep. 44-45, 48-49; Wells Dep. 29-32, 34; Sales Dep. 43-44; Jordan Dep. 58, 133; Leaphart Dep. 50, 63, 156; Pough Dep. 47, 50, 96-97; Cliff Adams Decl., ¶5).

49. Dancers perform at Club Onyx when they want to perform, regardless of whether they are, in fact, scheduled to perform. (Hayes Dep. 40; Sales Dep. 43-44; Jordan Dep. 58; Leaphart Dep. 77; Pough Dep. 96-97).

50. Dancers are also allowed to perform at other nightclub establishments in addition to Club Onyx. (Williams Dep. 9; Hayes Dep. 86; Adams Dep. 13; Leaphart Dep. 27-28, 32, 181; Wells Dep. 16-17, 80; Jordan Dep. 39, 41; Parker Dep. 37-38; Cliff Adams Decl., ¶5).

51. Some dancers also work at unrelated businesses in addition to performing at Club Onyx, which they operate when not performing at a club. (Leaphart Dep. 14-15, 37-38; Jordan Dep. 43; Pough Dep. 113; Cliff Adams Decl., ¶).

52. Dancers can spend as much time with a customer as they want, and can pick and choose the customers for whom they wish to perform. (Williams Dep. 47; Clincy Dep. 95; Wells Dep. 47, 71; Sales Dep. 69-70; Leaphart Dep. 157; Pough Dep. 65; Cliff Adams Decl., ¶5).

53. They are also free to negotiate their own fees or rates for spending time with the Club's customers on the floor or in the Club's VIP rooms. (Leaphart Dep. 92-93; Wells Dep. 47; Pough Dep. 71-72; Cliff Adams Decl., ¶5).

54. Dancers take breaks from performing whenever they want. (Williams Dep. 47).

55. Dancers can ignore a call to perform on the stage if she is performing a table-side dance for a customer or prefers not to do so. (Leaphart Dep. 152-153).

56. On slow nights, dancers sometime sit around the Club and read. (Sales Dep. 75-76).

57. Unlike the Club's bar and wait staff employees, dancers are allowed to drink alcohol and smoke cigarettes during their shifts. (Williams Dep. 47; Clincy Dep. 97; Parker Dep. 113; Sales Dep. 69-70; Jordan Dep. 100; Leaphart Dep. 117; Pough Dep. 75; Hayes Dep. 49; Cliff Adams Decl., ¶5).

58. Dancers are free to take off weeks, or sometimes even months at a time from performing at Club Onyx, and are permitted to return and perform without penalty. (Clincy Dep. 28-29, 47-48; Wells Dep. 72; Jordan Dep. 54-55; Leaphart Dep. 70, 75-76; Pough Dep. 98; Sales Dep. 22-24).

59. Dancers market and promote their own performances, including using social media networks, like Twitter® to increase the number of patrons who come to see them perform. (Leaphart Dep. 103-106; Hayes Dep. 94).

60. Dancers occasionally assist Club Onyx in promotional activities, since they directly benefit financially from highly promoted events. (Parker Dep. 153).

61. One way dancers market and promote themselves is to request a “birthday set,” whereby a dancer performs on stage at the Club with a group of other dancers, but keeps all the tip money herself, which can be substantial. (Hayes Dep. 94; Wells Dep. 73; Leaphart Dep. 101-105; Pough Dep. 89).

62. There is no express compensation agreement between Club Onyx and any Plaintiff, nor can one be implied. (Clincy Dep. 34-35).

63. The only agreement between Club Onyx and each Plaintiff acknowledges that each dancer is an independent contractor who works directly for patrons for whatever dance fee and tips she and the patron negotiate. (Williams Dep. 60).

64. Patrons pay each Plaintiff directly; Club Onyx is not involved in Plaintiffs’ transactions with patrons. (Williams Dep. 60-61).

65. Dancers divide stage dance tips among themselves with no involvement from Club Onyx. (Hayes Dep. 58-59; Clincy Dep. 94-95).

66. Plaintiffs generally decide when they wish to perform, for whom, and for how long. (Williams Dep. 47; Adams Dep. 36; Clincy Dep. 44-45, 48-49; Wells Dep. 29-32, 34; Leaphart Dep. 50, 63, 76-77, 179-180; Pough Dep. 47, 50, 96-97; Sales Dep. 43-44; Jordan Dep. 58, 133).

67. Club Onyx does not profit from the dancers; the dancers themselves do. (Williams Dep. 80; Clincy Dep. 53-54; Leaphart Dep. 68, 94-96; Wells Dep. 51; Sales Dep. 53; Parker 87; Pough 48-49).

68. The only “instruction” the Club offers dancers is with infrequently-enforced policies which basically ensure compliance with City vice laws and protects the Club’s liquor license. (Clincy Dep. 59-60; Leaphart Dep. 161, 172; Cliff Adams Decl., ¶8).

69. Dancers claim that on some shifts they perform at Club Onyx, they earn nothing, or pay more to the Club than they earn performing, effectively suffering a net loss for the shift. (Clincy Dep. 78-79, 112; Parker Dep. 57, 82, 119; Wells Dep. 42; Sales Dep. 55; Jordan Dep. 98-99; Leaphart Dep. 140; Pough Dep. 68).

70. Plaintiffs each earn a considerable amount of money performing at Club Onyx. (Clincy Dep. 73-74, 76-77, 79-80; Leaphart Dep. 22-23, 46-47, 72-73, 96-97, 100-102, 143-145; Parker Dep. 46-47, 1330134; Pough Dep. 42, 84, 90).

71. Dancers frequently leave Club Onyx at the end of their shift with a grocery bag full of money. (Clincy Dep. 79-80; Parker Dep. 133-134).

This 14th day of October, 2010.

Respectfully submitted,

/s/ Susan Kastan Murphey

SUSAN KASTAN MURPHEY

Georgia Bar No. 408498

/s/ Dean R. Fuchs

DEAN R. FUCHS

Georgia Bar No. 279170

/s/ Matthew P. Shaw

MATTHEW P. SHAW

Georgia Bar No. 101257

Counsel for Defendants

SCHULTEN WARD & TURNER, LLP
260 Peachtree Street, NW, Suite 2700
Atlanta, Georgia 30303
(404) 688-6800
(404) 688 6840 facsimile

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

KARENZA CLINCY, et al.)	
)	
Plaintiffs,)	
)	CIVIL ACTION FILE NO.
v.)	NO. 1:09-CV-2082-RWS
)	
GALARDI SOUTH ENTERPRISES,)	
INC., d/b/a THE ONYX, et al.)	
)	
Defendants.)	

CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that this filing complies with the font size requirements of Local Rule 7.1D and that I have this date served the within and foregoing **DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE REMAINS TO BE TRIED** on the following by using the Court's CM/ECF electronic filing system to insure delivery:

Donald H. Nichols:	nichols@nka.com
E. Michelle Drake:	drake@nka.com
Steven A. Smith:	smith@nka.com
Anna P. Prakash:	aprakash@nka.com
Jennifer K. Mason:	jkisermason@yahoo.com

This 14th day of October, 2010.

/s/ Dean R. Fuchs
DEAN R. FUCHS
Georgia Bar No. 279170

SCHULTEN WARD & TURNER, LLP
260 Peachtree Street, NW, Suite 2700
Atlanta, Georgia 30303
(404) 688-6800
(404) 688 6840 facsimile